

“expressly addressed” the states’ authority to impose state universal-service contribution requirements on interconnected VoIP providers. 543 F. Supp. 2d at 1067. The district court nonetheless concluded that the *NPSC USF Order* was preempted because “it is impossible [for Vonage] to distinguish between interstate and intrastate calls.” *Id.* at 1068. Citing this Court’s decision in *MPUC* affirming the *Vonage Preemption Order*, the district court stated that “[t]here is not a shred of evidence that takes this case outside the ‘impossibility exception.’” *Id.* at 1068.

The district court gave no weight to the FCC’s decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund; the district court simply stated that the *VoIP USF Order* “does not negate the fact that there is no way to distinguish between interstate and intrastate [VoIP] service.” *Id.* at 1067. In addition, although the district court recognized that the FCC has not decided “whether an interconnected VoIP service should be classified as a telecommunications service or an information service,” *id.* at 1065, the court dismissed the relevance of the *VoIP USF Order* by stating that it does not “affect the characterization of VoIP service as an information service,” *id.* at 1067.

SUMMARY OF ARGUMENT

The district court erred when it concluded that Vonage was likely to succeed on its claim that the *NPSC USF Order* was preempted under the rationale of the *Vonage Preemption Order*. Unlike the state regulations at issue in the *Vonage Preemption Order*, Nebraska's decision to require interconnected VoIP providers to contribute to the state's universal-service fund does not frustrate any federal rule or policy. Rather, the *NPSC USF Order* is fully consistent with the FCC's conclusion in the *VoIP USF Order* that requiring interconnected VoIP providers to contribute to the federal universal-service fund would serve the public interest.

Moreover, the NPSC's methodology for calculating the amount of interconnected VoIP revenue that is intrastate in nature does not conflict with the FCC's contribution rule. Rather, the NPSC's methodology mirrors the FCC's rule, thereby ensuring that Vonage will not be required to classify as intrastate any revenue that would be classified as interstate under the FCC's contribution rule.

Finally, this Court need not – and should not – address the regulatory classification of Vonage's VoIP service in this case. The FCC is currently considering the classification issue in the context of a comprehensive rulemaking proceeding, which is a far more appropriate forum for resolving the

technical and highly complex regulatory questions presented by interconnected VoIP service. Nor is it necessary for the Court to address the classification of Vonage's service in this case. The FCC's determination that interconnected VoIP providers should contribute to the federal universal-service fund shows that the *NPSC USF Order* is consistent with federal policy regardless of how VoIP services are classified under the Communications Act.

ARGUMENT

THE FCC HAS NOT PREEMPTED THE NPSC USF ORDER

In the *Vonage Preemption Order*, the FCC relied on the "impossibility exception" to preempt Minnesota's regulation of Vonage's VoIP service. Under the impossibility exception, the FCC may preempt state regulation of intrastate communications if "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e.*, state regulation would conflict with federal regulatory policies." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n*, 476 U.S. 375 n.4. With respect to the specific state regulations at issue in the *Vonage Preemption Order*, the FCC concluded that both components of this test had been met, and in *MPUC*, this Court affirmed the FCC's preemption analysis. The district court in this case concluded that this precedent compelled the conclusion that the *NPSC USF Order* was also

preempted under the impossibility exception, because Vonage still cannot accurately determine whether particular VoIP calls are interstate or intrastate in nature. *See* 543 F. Supp. 2d at 1068 (“There is not a shred of evidence that takes this case outside the ‘impossibility exception.’”).

The fundamental error in the district court’s preemption analysis is that it fails to consider the critical question of whether preemption is necessary to prevent the state regulation at issue from frustrating a valid federal policy objective. It is not enough to simply conclude that it is impossible to separate the interstate and intrastate aspects of the service – that is a necessary, but not a sufficient, finding to support preemption. *MPUC*, 483 F.3d at 578. A finding that state regulation would conflict with federal regulatory policies is also required. *Ibid.* In the *Vonage Preemption Order*, the FCC found that Minnesota’s entry and tariff regulations of Vonage’s service conflicted with the FCC’s deregulatory policies applicable to the interstate component of Vonage’s service. The FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional “economic regulation.” *See, e.g., Embarq Broadband Forbearance Order*, 22 FCC Rcd 19478, 19481 ¶ 5 (2007) (distinguishing “economic regulation” from universal service obligations and other “non-economic regulations designed to further important public policy

goals”). In contrast to the *Vonage Preemption Order*, the *NPSC USF Order* does not present a conflict with the FCC’s rules or policies. Rather, the NPSC’s decision to require interconnected VoIP providers to contribute to the state’s universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC’s rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska’s state universal-service contribution requirement.

1. The NPSC’s decision to require interconnected VoIP providers to contribute to the state universal-service fund does not frustrate federal policy objectives, but, in fact, promotes them. In the *VoIP USF Order*, the FCC explained that it would be in the public interest to require interconnected VoIP providers to contribute to universal service because “much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN.” *VoIP USF Order*, 21 FCC Rcd at 7540-41 ¶ 43. The Commission also found that requiring such contributions would promote competitive neutrality by “reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations.” *Id.* at 7541 ¶ 44. Both of these considerations apply with equal

force to the NPSC's decision in this case. Vonage benefits from the state's universal-service program because its customers in Nebraska (and elsewhere) undoubtedly value the ability to place calls to and receive calls from those in Nebraska who continue to rely on the PSTN for their telephony services. The *NPSC USF Order* also promotes competitive neutrality by ensuring that the burden of supporting universal service in Nebraska does not fall solely on Vonage's voice telephony competitors.

The NPSC's rule for determining the revenue base upon which the state's contribution requirements are assessed is also consistent with the FCC's contribution rules. The NPSC does not assess universal-service charges on any revenue deemed interstate; payments into the state fund are based solely on revenue deemed intrastate (which is, in turn, excluded from the interstate revenue base under the FCC's contribution rules). Nor does the NPSC require interconnected VoIP providers to classify as intrastate any revenue that the provider classifies as interstate under the FCC's rules. If an interconnected VoIP provider relies on the FCC's safe-harbor and presumes that 64.9 percent of its revenues flow from its interstate operations, under the *NPSC USF Order* it may use the equivalent presumption that 35.1 percent of its revenues are intrastate in nature. If an interconnected VoIP provider prepares a traffic study for the purpose of calculating its federal universal-service contribution, under

the *NPSC USF Order* it may use the same traffic study to calculate its corresponding state universal-service payment.² The third possibility – that an interconnected VoIP provider develops the ability to accurately distinguish interstate from intrastate calls – similarly ensures that interstate and intrastate revenue bases remain distinct. Thus, this is not a case in which preemption is necessary because the state has adopted an “allocation of [revenue] different from the allocation set forth” in the FCC’s rules. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986). Rather, here, there is no possibility that an interconnected VoIP provider will be forced to pay into

² After the NPSC issued the *NPSC USF Order*, the D.C. Circuit invalidated the requirement that an interconnected VoIP provider obtain the FCC’s preapproval before relying on a traffic study to calculate its federal universal-service contribution. *Vonage Holdings Corp. v. FCC*, 489 F.3d at 1243-44. Accordingly, the FCC no longer enforces the preapproval requirement against interconnected VoIP providers. For purposes of the conflict analysis in this brief, we assume that the NPSC would interpret the *NPSC USF Order*’s reference to an “FCC-approved traffic study” to mean a traffic study that the FCC allows an interconnected VoIP provider to use to calculate its federal universal-service contribution, regardless of whether the FCC has “preapproved” the traffic study.

Nebraska's universal-service fund on the basis of the same revenues that the provider uses to calculate its federal universal-service contribution.³

In sum, because the *NPSC USF Order* is not "inconsistent with the Commission's rules to preserve and advance universal service," 47 U.S.C. § 254(f), the district court erred in concluding that Vonage was likely to prevail on the merits of its preemption argument in this case.

2. The district court suggested that Vonage's preemption argument would likely prevail because interconnected VoIP service should be classified as an information service under the Communications Act. 543 F. Supp. 2d at 1067. The district court acknowledged that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service." *Id.* at 1065. The district court suggested, however, that the information-service classification was compelled by this Court's decision in *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (*Vonage*).

³ The assertion by Vonage that our 2006 letter to the Court undermines the NPSC's rule, *see* Vonage Br. at 26-27, is wrong. The letter means what it says. A safe-harbor percentage proxy is useful for approximating the interstate (and hence intrastate) revenues needed to calculate universal-service contributions; it is not in and of itself useful for classifying particular traffic, which would be necessary for state and federal entry and tariffing policies to coexist.

Contrary to the district court's view, this Court did not consider the classification of Vonage's VoIP service in *Vonage*. In that case, this Court reviewed a Minnesota district-court decision that had concluded that Minnesota's regulation of Vonage's VoIP service – the same regulations at issue in the *Vonage Preemption Order* – was preempted because Vonage provided an information service under the Communications Act. *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. Civ. 03-5287 (MJD/JG), 2004 WL 114983 (D. Minn. Jan 14, 2004) . After the district court had issued its decision, the FCC released the *Vonage Preemption Order*, which preempted Minnesota's regulations under the impossibility exception without regard to the regulatory classification of VoIP service. Because the “the FCC's order preempting [Minnesota's regulation] dispositively support[ed] the District Court's [judgment],” and was immune from “collateral attack[.]” in an appeal from that judgment, this Court “affirmed the judgment of the district court on the basis of the FCC Order.” 394 F.3d at 569. The Court accordingly had no occasion to address the merits of the district court's characterization of Vonage's service as an information service under the Communications Act.

Nor should the Court attempt to resolve the regulatory classification of Vonage's service in this case. Questions of regulatory classification are inherently “technical, complex, and dynamic,” and the “Commission is in a far

better position to address these questions than [the courts] are.” *National Cable and Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005). Premature adjudication of this issue by the courts would impinge on the FCC’s statutory responsibility to interpret and implement the Communications Act and could create significant confusion and uncertainty in the regulated community.

Moreover, it is unnecessary for this Court to address the classification of interconnected VoIP service in order to resolve the preemption question presented in this case. The FCC’s decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund did not turn on the regulatory classification of VoIP services. Accordingly, even if interconnected VoIP services are information services under the Communications Act, the *NPSC USF Order* would be consistent with federal policy for the reasons discussed above. The regulatory classification of interconnected VoIP service simply has no bearing on the conflict analysis at issue in this case.

CONCLUSION

The Court should reverse the district court's preliminary injunction in this case.

Respectfully submitted,

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August 5, 2008

IN THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

| | | |
|------------------------------------|---|-------------|
| VONAGE HOLDINGS CORP. AND VONAGE |) | |
| NETWORK INC., |) | |
| |) | |
| PLAINTIFFS-APPELLEES, |) | |
| |) | |
| V. |) | |
| |) | |
| NEBRASKA PUBLIC SERVICE COMMISSION |) | No. 08-1764 |
| ET AL., |) | |
| |) | |
| DEFENDANTS-APPELLANTS. |) | |

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EXHIBIT B
NEBRASKA USF/VoIP ORDERS

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. NUSF-1
Public Service Commission, on) Progression Order No. 18
its own motion, seeking to)
establish guidelines for) OPINION AND FINDINGS
administration of the Nebraska)
Universal Service Fund.)
) Entered: April 17, 2007

BY THE COMMISSION:

On September 26, 2006, the Nebraska Public Service Commission (Commission) entered Progression Order No. 18 seeking input from interested parties regarding the Commission's proposal to adopt a finding that interconnected VoIP service providers provide "telecommunications" and therefore are required to contribute to the state universal service mechanism and whether to require "interconnected VoIP service" providers offering service in Nebraska to contribute to the Nebraska Universal Service Fund (NUSF) based on the Federal Communications Commission's (FCC) safe harbor allocation factor adopted in the Contribution Order.

Interested parties filed testimony or comments in response to Progression Order No. 18 on or before November 17, 2006. Testimony was filed by Qwest Corporation (Qwest), the Rural Independent Companies (RIC), United Telephone Company of the West d/b/a Embarq (Embarq), Level 3 Communications LLC (Level 3), CommPartners Holding Corporation and the Commission Staff. Comments were filed by the Rural Telephone Coalition of Nebraska (RTCN), and Time Warner Cable. A public hearing was held on December 5, 2006. The pre-filed testimony and all comments were received into the record and sworn testimony was presented.

Post-hearing briefs were filed on January 19, 2007 by the RIC, Embarq, Qwest and the RTCN. Reply briefs were filed on February 2, 2007 by the Rural Independent Companies and Embarq.

O P I N I O N A N D F I N D I N G S

In this Order we determine that pursuant to Neb. Rev. Stat. § 75-118.01, the Commission has the authority to interpret the scope and meaning of its rules and regulations and definitions found therein. We determine that the term "telecommunications" and "telecommunications service" as defined in Title 291 Neb. Admin. Code, Chapter 10 includes "interconnected Voice over the Internet Protocol" (interconnected VoIP) service providers as the term is used by the FCC. Based on our review of relevant FCC orders and case law, we determine the Commission is not preempted from requiring interconnected VoIP service providers

to contribute to the Commission's state universal service fund. We therefore conclude that interconnected VoIP service providers must contribute equitably to the state-established universal service fund. The Commission further finds that using the reciprocal of the safe harbor percentage set forth in the FCC's *USF Contribution Order* along with alternative contribution options to establish Nebraska intrastate interconnected VoIP service provider revenues subject to the NUSF surcharge does not impose a burden on the federal universal service mechanism. We therefore conclude that interconnected VoIP service providers may choose among three options for separating interstate and intrastate revenues for purposes of assessing the NUSF surcharge which are:

- 1) Use an interim safe harbor allocation of 35.1 percent of VoIP traffic as intrastate;
- 2) Use actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.

We also conclude that the customer's billing address should be used to determine the state with which to associate intrastate revenues of an interconnected VoIP service provider.

Background

In 1996 Congress altered the telecommunications landscape by opening the local exchange service market to competition. While promoting competitive markets, Congress also sought to preserve the goal of universal service as defined in 47 U.S.C. § 254. Congress directed the FCC to establish a Federal-State Joint Board to assist in implementing the universal service principles of the Telecommunications Act. These principles, in summary form, include 1) quality services should be available at just, reasonable and affordable rates 2) access to advanced telecommunications and information services should be provided in all regions of the Nation 3) consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; 4) all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service and 5) there should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service. 47 U.S.C. § 254(b).

States are provided the authority to support universal service in the 1996 Telecommunications Act (the Act). Specifically, states are permitted to "adopt regulations not inconsistent with the Commission's [FCC's] rules to preserve and advance universal service."¹ The complete text of 47 U.S.C. § 254(f) provides:

Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the state, to the preservation and advancement of universal service in that state. A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden the universal service support mechanisms.

The Nebraska Telecommunications Universal Service Fund Act (NUSF Act) authorizes the Commission to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans have comparable accessibility to telecommunications services at affordable prices.²

The NUSF Act directs the Commission to require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law.³ The term "telecommunications company" is defined in the NUSF Act as "any natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier from the commission."⁴

¹ 47 U.S.C. § 254(f).

² Neb. Rev. Stat. § 86-317 (Cum. Supp. 2004).

³ Neb. Rev. Stat. § 86-324(2)(d) (Cum. Supp. 2004).

⁴ Neb. Rev. Stat. § 86-322 (Cum. Supp. 2004).

Neb. Rev. Stat. § 86-325 authorizes the Commission to adopt and promulgate rules and regulations "as reasonably required" to implement and operate the NUSF. Consistent with this authority, the Commission has adopted rules to implement the NUSF Act.⁵ In doing so, the NUSF Rules define various terms including "telecommunications service" and "telecommunications." Telecommunication service is defined in the NUSF Rules as "the offering of telecommunications for a fee."⁶ Telecommunications is defined as the "transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received."⁷

The NUSF Rules also provide that the NUSF surcharge shall not be assessed on interstate telecommunications services such as the subscriber line charge.⁸ However, in cases where a charge is made to a subscriber which has both intrastate and interstate telecommunications service components, and the interstate service is not charged separately or cannot be readily determined, the NUSF surcharge applies to the total charge, unless such a determination would result in an undue administrative burden, then Commission may establish an allocation factor to determine the intrastate portion of the service or may adopt relevant FCC safe harbor provisions.⁹

By virtue of Neb. Rev. Stat. § 75-118.01, the Commission has the authority to interpret the scope and meaning of its rules and regulations. The Commission has exclusive jurisdiction to interpret the meaning or extent of existing rules and regulations and may do so after notice and hearing.¹⁰

The Commission has, on a previous occasion with regard to Application NUSF-40/PI-86, interpreted the terms "telecommunications" and "telecommunications service" to apply to facilities-based VoIP service.¹¹ That decision was appealed by Qwest and ultimately a stipulation was entered into between

⁵ See generally, 291 NAC Chap. 10 (the "NUSF Rules").

⁶ 291 NAC § 10.001.01X.

⁷ 291 NAC § 10.001.01V.

⁸ 291 NAC § 10.002.01D1.

⁹ 291 NAC § 10.002.01D1a and 10.002.01D1b.

¹⁰ See *In re Proposed Amendment to Title 291, Chapter 3 of Motor Carrier Rules and Regulations*, 264 Neb. 298, 646 N.W.2d 650 (2002).

¹¹ In the Matter of the Nebraska Public Service Commission, on its own motion, to determine the extent to which Voice Over Internet Protocol Services should be subject to the Nebraska Universal Service Fund requirements, Application No. NUSF-40/PI-86.

the parties and filed with the Lancaster County District Court.¹² Pursuant to the terms of the Stipulation the Commission was required to open a docket and seek comment on specific questions related to the Commission's definition of facilities-based VoIP providers. The instant docket is the Commission's compliance with the terms of the Stipulation.

Last June, the FCC released the *USF Contribution Order* requiring "interconnected VoIP service" providers to contribute to the federal universal service mechanism.¹³ The FCC found that interconnected VoIP service providers furnish telecommunications. Accordingly, the FCC used permissive authority found in 47 U.S.C. § 254 to find that interconnected VoIP service providers should contribute to the federal universal service support mechanism to advance the public interest. Following the issuance of the FCC's *USF Contribution Order*, on September 26, 2006, this Commission initiated the instant proceeding and requested carrier input with regard to a proposal to require interconnected VoIP service providers providing service in Nebraska to contribute to the NUSF based on the FCC's safe harbor allocation factor.

Discussion

Commission Authority to Determine the Scope and Meaning of Telecommunications and Telecommunications Service

Level 3 and Qwest assert that the FCC has the exclusive jurisdiction concerning the characterization of interconnected VoIP service and that the Commission is preempted from requiring Nebraska interconnected VoIP service providers to contribute to the NUSF. In its testimony and at the hearing, Level 3 contended the *Vonage Order*¹⁴ preempts state commissions from asserting separate jurisdiction over interconnected VoIP services.¹⁵ Qwest argued in its post-hearing brief that the FCC used the Commerce Clause to preempt the entire field of VoIP.¹⁶ RIC, RTCN, Embarq and, the Commission Staff all disagreed

¹² *Qwest Corporation v. Nebraska Public Service Commission, et al.*, Case No. CI 05-1721.

¹³ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) (the "*USF Contribution Order*").

¹⁴ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (FCC rel. Nov. 12, 2004) ("*Vonage Order*").

¹⁵ Testimony of Greg L. Rogers on Behalf of Level 3 Communications, LLC, Exhibit No. 3, pg. 3.

¹⁶ *Qwest Corporation's Post-Hearing Brief* (January 22, 2007) at 2 ("*Qwest Brief*").

stating the *Vonage Order* does not support these claims of preemption.

The *Vonage Order* was a declaratory ruling made by the FCC in 2004 regarding Vonage Holding Corporation's VoIP offering called Digital Voice. The Minnesota Commission entered an order requiring Vonage to submit to its traditional certification requirements. The FCC found that with respect to Vonage's Digital Voice service, that the service was jurisdictionally mixed and practically inseparable. Accordingly, the FCC preempted the Minnesota order requiring certification. Some other companies have relied on dicta in the *Vonage Order* which states that the FCC would likely preempt similar VoIP services from traditional state certification requirements. However, we agree with RIC, Embarq, RTCN and the Commission Staff that the *Vonage Order* does not preempt the Commission's authority to require interconnected VoIP service providers from contributing to the NUSF. Rather, the FCC carved out a distinction for E911, universal service, CALEA and other issues by stating:

We do not determine the statutory classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future. These issues are currently the subject of our IP-Enabled Services Proceeding where the Commission is comprehensively examining numerous types of IP-enabled services, including services like Digital Voice. See generally IP-Enabled Services Proceeding, 19 FCC Rcd 4863. That proceeding will resolve important regulatory matters with respect to IP-enabled services generally, including services such as Digital Voice, concerning issues such as the Universal Service Fund, and the extent to which the states have a role in such matters. (emphasis added)¹⁷

The FCC also stated:

By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and

¹⁷ *Vonage Order* at footnote 46.

other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry.¹⁸

Later, in paragraph 44 of the *Vonage Order*, the FCC yet again stated:

[W]e have yet to determine final rules for a variety of issues discussed in the IP-Enabled Services Proceeding. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as Universal Service . . . in that proceeding. (Emphasis added)¹⁹

Upon consideration of the language in the *Vonage Order*, the Commission disagrees with the interpretation thereof by Level 3 and Qwest regarding preemption. The Commission finds that the FCC has specifically reserved ruling on the issue of universal service and a state's ability to assess state universal service contributions by interconnected VoIP service providers. The clear language in the *Vonage Order* states that such issues may be considered in the FCC's *IP-Enabled Services Proceeding*.

In addition, a recent federal court opinion interpreting the scope of the *Vonage Order* supports the foregoing conclusion by the Commission. In *Comcast IP Phone of Missouri, LLC v. MPSC*, 207 WL 172359 (W.D. MO., Jan. 18, 2007) ("*Comcast*"), the federal court declined to enjoin the Missouri Public Service Commission (MPSC) from proceeding with an action pending against Comcast before the MPSC regarding certification of its VoIP service offering. Comcast requested the federal court to find, as a matter of law that the MPSC is without legal authority to classify as a telecommunications service Comcast's VoIP service. Comcast had further argued that the MPSC could not classify its Digital Voice offering as a telecommunications service unless and until the FCC determined that its Digital Voice is a telecommunications service. The court found the MPSC had the authority to decide whether the VoIP service offered by Comcast was a telecommunications service subject to state regulation. The Court further found that the FCC has not preempted the entire field of VoIP services and that in at least one case, it has determined that a VoIP service was a telecommunications service.

¹⁸ *Id.*

¹⁹ *Vonage Order* at para. 44, citing footnote 46.

In sum, we find that the *Vonage Order* has not preempted the Commission's ability to classify VoIP service offerings for the purpose of universal service. Further, we find pursuant to the persuasive authority in the *Comcast* decision that the Commission has not been precluded by federal law from determining whether interconnected VoIP service falls within the scope and meaning of "telecommunications" and "telecommunications service" pursuant to this Commission's NUSF Rules.

In the *VoIP 911 Order*,²⁰ the FCC determined that "interconnected VoIP service" permits users to receive calls from and terminate calls to the public switched telephone network (PSTN).²¹ Interconnected VoIP services were defined by the FCC in the *VoIP 911 Order* as "services that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN."²² Thus, providers of interconnected VoIP services must provide access to the PSTN, either by relying on their own facilities or by using others' facilities, and transmission of user information necessarily occurs over such access facilities. The *VoIP 911 Order* requires interconnected VoIP service providers to provide customers with access to 911 services, and to provide a disclaimer of any limitations in their ability to provide 911 service and location information to public safety answering points.

A year later, on June 27, 2006, the FCC released the *USF Contribution Order*²³ which required providers of interconnected VoIP services as defined by the FCC to contribute to the federal universal service fund. In that Order, the FCC concluded that such transmission constitutes the offering of "telecommunications" by interconnected VoIP service providers.²⁴ The FCC found that interconnected VoIP service providers provide interstate telecommunications and therefore could be subject to the permissive authority in Section 254 of the 1996 Act.²⁵ To

²⁰ *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245(2005) ("VoIP 911 Order").

²¹ See *Post-Hearing Brief of the Rural Independent Companies* (January 19, 2007) at 10 ("RIC Brief").

²² *VoIP 911 Order*, 20 FCC Rcd 10245, 10257-58, ¶ 24 (2005).

²³ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-11, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) ("USF Contribution Order").

²⁴ See RIC brief at 10.

²⁵ Time Warner argues in its comments that the Commission has not identified any ancillary jurisdiction that would authorize it to require interconnected VoIP service providers to contribute to the NUSF. See Comments of Time Warner

make the finding that interconnected VoIP service is interstate telecommunications, the FCC found interconnected VoIP services were jurisdictionally mixed, and because it was difficult to determine the origin and termination points of voice calls, decided that the service was, for practical purposes, inseparable. In the *USF Contribution Order*, the FCC remained silent on states' ability to assess a universal service surcharge on the intrastate portion of revenues derived from interconnected VoIP service. However, the FCC established a safe harbor provision, similar to its approach on wireless traffic, in order to allocate a percentage of calls to the interstate jurisdiction.²⁶

Upon review of the *USF Contribution Order*, the Commission agrees with the argument provided by RIC that by expressly comparing the choice of a safe harbor or traffic measurement for use by interconnected voice service providers which is similar to the choice available to commercial mobile radio service (CMRS) providers, the Commission could reasonably assume that the FCC anticipated and tacitly approved assessment of the NUSF surcharge on the Nebraska intrastate portion of interconnected VoIP service provider revenues.²⁷ CMRS providers are similarly considered to provide interstate telecommunications, and have been and continue to be properly subject to state universal service surcharge assessment.

We further find there is nothing in the NUSF Act that limits the Commission's ability to determine whether interconnected VoIP service providers provide telecommunications or telecommunications services. The Nebraska Constitution grants general power to the Commission to regulate telecommunications except where limited by specific legislation.²⁸ Further, the Commission finds that interconnected VoIP service falls within the Legislature's statutory delegation of authority to the Commission. Recently, in *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006) the Nebraska Supreme Court, approving the delegation of authority to the Commission, found:

Regulation of the telecommunications industry
is a complex field as to which the PSC has

at 11. However, the Commission agrees with Embarq that it need not rely on any ancillary jurisdiction. The Commission needs only to look to Nebraska law for authority as long as there is no conflicting federal law. *Post-Hearing Brief of United Telephone Company of the West d/b/a Embarq* (January 19, 2007) at 4 ("Embarq Brief").

²⁶ See *USF Contribution Order*, paras. 52-57.

²⁷ RIC brief at 8.

²⁸ *Neb. Const.* Art. IV, § 20.

special expertise and constitutional authority. The fact that the standards set forth in the NTUSFA permit the exercise of discretion by the PSC in its implementation reflects this reality.

272 Neb. 369-70. The Court further stated that,

The NTUSFA is specific legislation on a subject which the state Constitution generally entrusts to the PSC, namely the regulation of communications rates and services. It authorizes the PSC to establish a new means of achieving a long-standing goal of universal service by replacing subsidies which had previously been implicit in rates set by the PSC with explicit subsidies administered through the Fund.

272 Neb. 366. Accordingly, the Commission concludes that it has the authority to regulate communications services including the authority to classify and define "Nebraska interconnected VoIP service" provider.

Classification of Interconnected VoIP service Providers and the Requirement to Contribute to the NUSF

The RIC, RTCN, Embarq and the Commission Staff supported a proposed finding that Nebraska interconnected VoIP service providers are telecommunications companies offering telecommunications services in the State of Nebraska. Embarq, RIC and RTCN argued that the interconnected VoIP service providers are required by law to contribute to the NUSF.

The terms "interconnected VoIP services" and "interconnected VoIP service providers" were recently developed by the FCC. The FCC imposed on providers of "interconnected VoIP service" the obligation to provide 911 services and the obligation to contribute to the federal universal service mechanism. The FCC defines "interconnected VoIP services" as "services that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN."²⁹ In creating this term, the FCC developed a subset of IP-Enabled service providers and placed

²⁹ 47 C.F.R. § 9.3.

certain requirements upon this subset as appropriate to further public interest.

We find, consistent with the federal definition, that the classification "interconnected VoIP service" provider should be used to determine whether such providers provide "telecommunications" in Nebraska and whether such providers offer "telecommunications service." The Commission interprets the terms "telecommunications" and "telecommunications service" pursuant to the authority to define the scope and meaning of the NUSF Rules as they pertain to carriers.³⁰

In Neb. Admin. Code, Title 291, Chapter 10, section 001.01V, the NUSF Rules define "telecommunications" as "the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received." The FCC found that interconnected VoIP service providers provide the transmission, between or among points specified by the user, of information of the user's choosing, without a change in the form or content of the information sent and received.³¹ Similarly, based on the comments and testimony filed in this proceeding, we find that the Commission's definition of telecommunications would encompass interconnected VoIP service providers despite the use of the term "subscriber" versus the term "user" in the Commission's definition. The Commission finds that for the purposes of defining the term "telecommunications" the term subscriber should have the same meaning and effect as the term user. We also agree with the commenters that interconnected VoIP service providers by definition provide the "transmission" to permit users or subscribers of this service to receive calls from and terminate calls to the public switched telephone network. Further, we find that such providers provide the information of the subscriber's choosing without a change in the form or content of the information as sent or received. No party offered any evidence which would dispute the finding that Interconnected VoIP service providers provide "telecommunications" as defined by the federal Act or by the NUSF Rules.³²

³⁰ See Neb. Rev. Stat. § 75-118.01.

³¹ *USF Contribution Order*, ¶ 39.

³² As stated *supra*, Qwest claimed in its post-hearing brief that the FCC declared interconnected VoIP service as an information service. However, we reject that argument. Should the FCC later decide in its generic *IP-Enabled Services* docket that interconnected VoIP providers are information service providers, the Commission will open a proceeding to revisit this decision.